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Jesse Garfinkle
jesse.garfinkle@bc.edu

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SCOPE OF REVIEWABLE EVIDENCE IN NEPA PREDETERMINATION CASES: WHY GOING OFF THE RECORD PUTS COURTS ON TARGET

JESSE GARFINKLE*

Abstract: Plaintiffs challenging an agency's environmental impact statement on the grounds of predetermination have been met with different judicially created evidentiary standards. Under the Fourth Circuit's approach, as applied in *National Audubon Society v. Department of the Navy*, courts should restrict the scope of reviewable evidence to the administrative record. Under the Tenth Circuit's approach, however, extra-record evidence may also be considered in determining predetermination claims. In *Forest Guardians v. U.S. Fish and Wildlife Service*, the Tenth Circuit considered emails, intra-agency correspondence, and a grant agreement outside the scope of the administrative record, and concluded that the agency had not predetermined the outcome of its impact statement. This Note advocates for the universal adoption of the expansive Tenth Circuit approach because of the importance of extra-record evidence in predetermination cases and its minimal risk to agency independence.

INTRODUCTION

Federal agencies stand at the front lines of both the national defense and preservation of the environment.¹ To this end, the National Environmental Policy Act (NEPA) requires agencies to carefully consider the environmental impacts of their proposed monitoring or executing actions before proceeding.² A key mechanism to ensure the proper execution of this duty is NEPA's proscription of an agency's commitment of resources to a certain course of action prior to the completion of this analysis.³ In prohibiting such premature commitments, NEPA not only seeks to ensure comprehensive environmental analyses but also to eliminate sunk costs—namely the premature investment of resources into undesirable courses of action that may result

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¹ See National Environmental Policy Act of 1969, 42 U.S.C. § 4331 (2006).

² See *id.* § 4332.

³ 40 C.F.R. § 1500.1 (2010).

in negative environmental consequences.⁴ This prohibition serves to prevent predetermined outcomes of environmental analyses.⁵

Although NEPA imposes this critical mandate, the statute is silent on the enforcement of this duty and thus it is left entirely to reviewing courts.⁶ Courts have long struggled with the proper standards for reviewing predetermination claims in environmental analyses under NEPA, and the permissible scope of evidence on review continues to divide federal circuit courts.⁷ Courts consistently disagree on the propriety of broad evidentiary review, the efficacy of narrowly tailored review in rooting out predetermination, and the inherent dangers and safeguards of off the record judicial review.⁸ In its recent opinion, *Forest Guardians v. U.S. Fish and Wildlife Service*, the Tenth Circuit highlights the central debate regarding the consideration of evidence not included in the administrative record.⁹ Whereas the Fourth Circuit applies a narrow evidentiary scope allowing only evidence on the record,¹⁰ the Tenth Circuit uses an expansive approach that allows examination of extrinsic evidence.¹¹

This Note explores how the Tenth Circuit's broad evidentiary approach ensures both rigorous enforcement of NEPA's procedures and adequate protection of the nation's environment from the risks of agency predetermination.¹² Part I of this Note considers the statutory and regulatory framework that imposes agency responsibilities, and addresses the issue of predetermination. Parts II and III explore both statutory and common law standards for evaluating agency predetermination claims. Part IV demonstrates the need for a broad evidentiary approach, consistent with that of the Tenth Circuit, in assessing allegations of predetermination.

⁴ See *infra* notes 28–51 and accompanying text.

⁵ See *infra* notes 73–78 and accompanying text.

⁶ See *infra* notes 95–102 and accompanying text.

⁷ Compare *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 716–17 (10th Cir. 2010), with *Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 198–99 (4th Cir. 2005).

⁸ Compare *Forest Guardians*, 611 F.3d at 716–17 (considering extra-record emails, meeting minutes, and a grant agreement), and *Metcalf v. Daley*, 214 F.3d 1135, 1143–44 (9th Cir. 2000) (considering extra-record contracts), and *Davis v. Mineta*, 302 F.3d 1104, 1112 (10th Cir. 2002) (considering extra-record addendum to a services agreement), with *Nat'l Audubon*, 422 F.3d at 198–99 (refusing to consider extra-record evidence), and *Fayetteville Area Chamber of Commerce v. Volpe*, 515 F.2d 1021, 1026 (4th Cir. 1975) (noting reluctance to examine subjective impartiality of agency decisionmakers).

⁹ See 611 F.3d at 716–17; *Nat'l Audubon*, 422 F.3d at 198–99.

¹⁰ *Nat'l Audubon*, 422 F.3d at 198–99.

¹¹ See *Forest Guardians*, 611 F.3d at 716–17.

¹² See *infra* notes 145–197 and accompanying text.

I. STATUTORY AND REGULATORY FRAMEWORK

A. *The National Environmental Policy Act*

Environmental protection has long been a serious concern in modern American government.¹³ Congress enacted NEPA in recognition of “the profound impact of man’s activity on the interrelations of all components of the natural environment,” and as a means to restore order and maintain environmental quality.¹⁴ NEPA declares a national policy encouraging the prevention and elimination of environmental damage.¹⁵ In pursuit of this purpose, Congress instructs all federal agencies to preserve, protect, and enhance the environment.¹⁶

Congress delineates the responsibilities of federal agencies under NEPA in section 102(2).¹⁷ First, it requires federal agencies to consider every significant environmental aspect of a proposed action.¹⁸ Under this directive, NEPA mandates that a federal agency include, in every recommendation or report on legislative proposals and other major federal actions significantly affecting the quality of the environment, a detailed statement on the environmental impact and unavoidable adverse environmental effects of the proposed action, as well as alternatives to the proposed action.¹⁹ This document is called an Environmental Impact Statement (EIS).²⁰ Second, it guarantees that relevant

¹³ See National Environmental Policy Act of 1969, 42 U.S.C. § 4331 (2006).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* §§ 4331–4332.

¹⁷ *Id.* § 4332.

¹⁸ *Id.* § 4332(C); *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983).

¹⁹ 42 U.S.C. § 4332(C). Agencies must:

include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

²⁰ *Environmental Management—Environmental Impact Statement*, ENVTL. PROT. AGENCY, <http://www.epa.gov/ehtpages/envienvIRONMENTALIMPACTSTATEMENT.html> (last visited Jan 18, 2012); see *Nat’l Audubon*, 422 F.3d at 181.

information will be made available to the public, thus allowing citizens to play a role in both the decision-making and implementation processes.²¹ By requiring a comprehensive evaluation of environmental impacts prior to a Record of Decision,²² NEPA seeks to avoid sunk costs arising from investment in a course of action that may not be the best alternative as determined by the EIS.²³ Sunk costs result when a proponent of an action invests significant expenses or resources into early stages of a proposal.²⁴ Aside from wasting money, time, and resources, such actions often harm the environment in ways that statutes like NEPA are designed to prevent.²⁵ Courts are often left with tremendously difficult, and highly pressured, decisions as to whether to enforce environmental laws or to avoid wasted resources and sunk costs.²⁶ Additionally, the prevention of such sunk costs plays a role in preserving the viability of alternatives that could otherwise be precluded if significant investment in a more harmful course of action had already occurred.²⁷

B. Council on Environmental Quality

NEPA's procedural requirements alone are insufficient to ensure meaningful environmental protection, and thus section 202 of the statute created the Council on Environmental Quality (CEQ)²⁸ to oversee the its implementation.²⁹ Although NEPA does not expressly authorize the CEQ to promulgate regulations, President Carter added this responsibility by Executive Order in 1977.³⁰ These regulations instruct federal agencies on how to comply with NEPA's procedures and poli-

²¹ See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349–50 (1989).

²² 40 C.F.R. § 1505.2 (2010). A Record of Decision must include: (a) what the decision was; (b) alternatives considered in making the decision, including preferred alternatives; (c) whether all practicable means of avoiding or minimizing environmental harm have been adopted, and if not, why they were not. *Id.*

²³ See Jeffrey S. Kopf, Comment, *Steamrolling Section 7(D) of the Endangered Species Act: How Sunk Costs Undermine Environmental Regulation*, 23 B.C. ENVTL. AFF. L. REV. 393, 400 (1996).

²⁴ *Id.* at 393–94.

²⁵ See *id.* at 394.

²⁶ *Id.*

²⁷ See *id.* at 400.

²⁸ See National Environmental Policy Act of 1969, 42 U.S.C. § 4342 (2006).

²⁹ See *id.* § 4344.

³⁰ Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (May 24, 1977). “Subsection (h) of Section 3 (relating to responsibilities of the Council on Environmental Quality) of Executive Order No. 11514, as amended, is revised to read as follows: ‘(h) Issue regulations to Federal agencies for the implementation of the procedural provisions of [NEPA],’ including the [Environmental Impact Statement] process.” *Id.*

cies.³¹ CEQ regulations are binding on all federal agencies³² and serve as formal guidance to the courts on the application of NEPA.³³ The CEQ's regulatory processes explicitly ensure that environmental information is made available to the public before decisions are made or actions are taken.³⁴

An environmental impact analysis occurs in two distinct forms under CEQ regulations pursuant to NEPA.³⁵ The first method of analysis is the EIS, which an agency must prepare when it has reason to believe that a proposed action may have environmental impacts.³⁶ EISs must be "analytic rather than encyclopedic,"³⁷ and concise, varying in length with potential environmental problems and project size.³⁸ An EIS must state the alternatives considered, and any subsequent decisions that rely on it must meet the procedural and policy requirements of NEPA.³⁹ The spectrum of alternatives considered within an EIS must also include potential alternatives to be considered by the ultimate agency decision-maker.⁴⁰ Section 1502.14(e) of the CEQ regulations allows for, and arguably encourages, preferred alternatives in the EIS process.⁴¹ Additionally, the CEQ addresses the danger of agency predetermination by mandating that an agency must not commit resources that would prejudice selection of alternatives before making a final decision.⁴² This prohibition is justified by the CEQ's intention that the EIS serve as the means of assessing the environmental impact of proposed actions, rather than justifying decisions retroactively.⁴³ Furthermore, CEQ regulations require that "until an agency issues a [R]ecord of [D]ecision . . . no action concerning the proposal shall be taken which would: (1) [h]ave an adverse environmental impact; or (2) [l]imit the choice of reasonable alternatives."⁴⁴ This prohibition is aimed at preventing sunk

³¹ 40 C.F.R. § 1500.1(a) (2010).

³² *Id.* § 1507.1.

³³ *See* *Marsh v. Or. Nat'l Res. Council*, 490 U.S. 360, 372 (1989).

³⁴ *See* 40 C.F.R. § 1500.1(b).

³⁵ *See id.* § 1501.3 (establishing the Environmental Assessment (EA)); *id.* § 1502 (establishing the Environmental Impact Statement (EIS)).

³⁶ *See* 40 C.F.R. § 1502.

³⁷ *Id.* § 1502.2(a).

³⁸ *Id.* § 1502.2(b)–(c).

³⁹ *Id.* § 1502.2(d).

⁴⁰ *Id.* § 1502.2(e).

⁴¹ *Id.* § 1502.14(e).

⁴² 40 C.F.R. § 1502.2(f).

⁴³ *Id.* § 1502.2(g).

⁴⁴ *Id.* § 1506.1(a).

costs that may result in the preclusion of better alternatives or the improper selection of a more environmentally harmful course of action.⁴⁵

The second form of environmental impact analysis under NEPA is the Environmental Assessment (EA).⁴⁶ An EA is a concise public document that must provide sufficient evidence and analysis to determine whether a “finding of no significant impact” (FONSI) is warranted or an EIS is required.⁴⁷ CEQ regulations require that “[a]gencies shall prepare an [E]nvironmental [A]ssessment . . . when necessary under the procedures adopted by individual agencies to supplement these regulations.”⁴⁸ An EA is not required when an agency is otherwise preparing an EIS, as the environmental impacts are adequately examined and reported.⁴⁹ An EA, however, assists an agency’s preparation of an EIS when one is necessary.⁵⁰ If significant environmental impacts are demonstrated by an EA, the agency must prepare an EIS; if not, the agency issues a FONSI.⁵¹

II. JUDICIAL REVIEW OF AGENCY DECISIONS UNDER NEPA

A. *Arbitrary and Capricious*

When courts are called to review an agency’s Environmental Impact Statement (EIS) or Environmental Assessment (EA) under NEPA, they are presented with a limited number of flexible standards that provide a significant amount of judicial discretion in their application.⁵² NEPA provides no explicit guidance to courts in reviewing an agency’s compliance with its procedural provisions.⁵³ It also does not contain a citizen suit provision to enable private parties to enforce violations of its requirements.⁵⁴ Due to this omission, private citizens and environmental groups must file suit under the Administrative Proce-

⁴⁵ Kopf, *supra* note 23, at 400.

⁴⁶ 40 C.F.R. § 1501.3. This Note will refer to both EISs and EAs as environmental impact analyses, and, in discussing agency predetermination for the purposes of this Note, the two forms of analysis are treated as the same.

⁴⁷ *Id.* § 1508.9(a).

⁴⁸ *Id.* § 1501.3(a).

⁴⁹ *See id.*

⁵⁰ *Id.* § 1508.9(3).

⁵¹ *See id.* § 1501.4.

⁵² *See* Administrative Procedure Act, 5 U.S.C. § 706(2) (2006); DANIEL R. MANDELKER, NEPA LAW AND LITIG. § 8.7 (2d ed. & Supp. 2010).

⁵³ *See* MANDELKER, *supra* note 52, § 8.7.

⁵⁴ FRANK B. CROSS, FED. ENVTL. REG. OF REAL EST., § 1.21 (2008 Supp. 2011).

dures Act (APA).⁵⁵ Federal district courts have jurisdiction over cases involving agency compliance with the provisions of NEPA.⁵⁶

Section 706 of the APA enables federal courts to find unlawful and invalidate agency actions, findings, and conclusions⁵⁷ if they violate any of six specified standards.⁵⁸ In *Marsh v. Oregon Natural Resources Council*, the Supreme Court tackled the question of judicial review under NEPA in accordance with APA standards.⁵⁹ In *Marsh*, the Court considered a suit, brought by a nonprofit organization, to enjoin the building of a dam based on allegations that the Army Corps of Engineers had violated NEPA's EIS requirements.⁶⁰ The Court determined that a "reasonableness" standard would not provide enough deference to the informed discretion of the agency.⁶¹ Reluctant to engage in its own determination of "reasonableness" on substantive matters, the Court held that the "arbitrary and capricious" standard should instead be applied to NEPA cases.⁶² This standard, applied under the APA to NEPA, allows a court to set aside an agency's action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁶³ The *Marsh* Court took notice of the Ninth Circuit's use of the reasonable-ness standard, but noted that the standard was not uniformly adopted among the circuits and that very little pragmatic difference existed between the two standards.⁶⁴ Although departing from the Ninth Circuit's

⁵⁵ *Id.*

⁵⁶ *Coahoma Chem. Co. v. Ruckelshaus*, 358 F. Supp. 680, 682 (1973).

⁵⁷ 5 U.S.C. § 706(2) (2006).

⁵⁸ *Id.* Section 706 reads:

Under the APA, a court can set aside any agency action which is: "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to [trial-type proceedings]; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Id.

⁵⁹ 490 U.S. 360, 375 (1989).

⁶⁰ *Id.* at 360.

⁶¹ *Id.* at 375–78. Although deference should be given, the Court warned that "courts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance—or lack of significance—of the new information." *Id.* at 378.

⁶² *Id.* at 375–78.

⁶³ 5 U.S.C. § 706(2).

⁶⁴ 490 U.S. at 377 n.23.

application of the reasonableness standard, the Court agreed that it makes sense to distinguish the strong level of deference accorded to an agency in deciding factual or technical matters from the lesser deference given when considering predominantly legal questions.⁶⁵ Thus, the arbitrary and capricious standard is now applied consistently in substantive NEPA cases.⁶⁶

B. *Hard Look Doctrine*

In the wake of prolonged debate regarding the proper application of the arbitrary and capricious standard,⁶⁷ the “hard look” doctrine emerged from *Greater Boston Television Corp. v. FCC*.⁶⁸ In that case, the court explained that the “supervisory function calls on the court to intervene . . . if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a ‘hard look’ at the salient problems, and has not genuinely engaged in reasoned decision making.”⁶⁹ If the agency took a hard look at the issue, however, the court should affirm the agency’s action even if the court would “have made different findings or adopted different standards.”⁷⁰ Furthermore, the opinion stated that a court should not disturb an agency decision due to immaterial errors because the doctrine of harmless error is appropriate in such circumstances.⁷¹ This doctrine has become the cornerstone for judicial review on federal administrative agency actions, and courts use it to apply the APA’s arbitrary and capricious standard in determining whether an agency analysis was adequate under NEPA.⁷²

C. *Predetermination: The Irretrievable and Irreversible Commitment of Resources*

In applying these standards, courts uphold CEQ regulations prohibiting predetermined decisions prior to the completion of an EIS or

⁶⁵ See *id.* at 376–77.

⁶⁶ See, e.g., *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 716–17 (10th Cir. 2010); *Nat’l Audubon Soc’y v. Dep’t of the Navy*, 422 F.3d 174, 198–99 (4th Cir. 2005); *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000).

⁶⁷ Devin Kirby, Casenote, *What Is the “Hard Look” That the Ninth Circuit Is Looking for When Reviewing United States Forest Service Actions Under NEPA?* Native Ecosystems Council, et al. v. United States Forest Service, et al., MO. ENVTL. L. & POL’Y REV. 213, 216 (2003).

⁶⁸ 444 F.2d 841, 851 (D.C. Cir. 1970); Kirby, *supra* note 67, at 216.

⁶⁹ 444 F.2d at 851.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See, e.g., *Forest Guardians*, 611 F.3d at 710–11; *Nat’l Audubon*, 422 F.3d at 181; *Metcalf*, 214 F.3d at 1145.

EA by finding that such predetermination precludes an agency from taking the requisite hard look.⁷³ Section 1502.2 clearly prohibits such predetermination, stating that “[a]gencies shall not commit resources prejudicing selection of alternatives before making a final decision.”⁷⁴ Courts have established a threshold for such predetermination, namely the “irretrievable and irreversible commitment of resources” to a course of action prior to the completion of the environmental impact analysis.⁷⁵ The temporal threshold of such a commitment of resources is consistent with the CEQ’s stance that judicial review of agency compliance only occur after an agency has either filed the final EIS or FONSI, or takes action that will result in irreparable harm to the environment.⁷⁶ Courts have held that such an irreversible commitment of resources “seriously impeded the degree to which [an agency’s] planning and decisions could reflect environmental values.”⁷⁷ In light of NEPA’s guiding policies and the CEQ’s procedural regulations, courts have consistently held that violations of the arbitrary and capricious standard occur when an agency prematurely and irretrievably commits resources to an alternative prior to the completion of an environmental impact analysis.⁷⁸

D. *Record Rule*

Courts have widely recognized that an agency need not be “subjectively impartial” in making a conclusion about environmental impacts pursuant to section 1502.14(e)’s allowance for preferred alternatives,⁷⁹ as well as the inevitability that an agency will develop a preference for one form of action over others.⁸⁰ Furthermore, courts adhere to the principle that the judiciary should not engage in substantive analysis of the wisdom of a chosen plan of action, as judges are neither experts in the field nor tasked with such statutory responsibility.⁸¹ There is a clear lack of consensus, however, on how to fulfill the judicial role in reviewing agency decisions, with some courts willing to review only evidence

⁷³ See *Metcalf*, 214 F.3d at 1145; 40 C.F.R. § 1502.2(f) (2010).

⁷⁴ 40 C.F.R. § 1502.2(f).

⁷⁵ *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988).

⁷⁶ 40 C.F.R. § 1500.3.

⁷⁷ *Metcalf*, 214 F.3d at 1143.

⁷⁸ See, e.g., *id.* at 1145; *Conner*, 848 F.2d at 1446, 1462.

⁷⁹ 40 C.F.R. § 1502.14.

⁸⁰ See *Forest Guardians*, 611 F.3d at 712.

⁸¹ See *Nat’l Audubon*, 422 F.3d at 198–99.

in the administrative record and others allowing the consideration of extrinsic evidence.⁸²

The seminal case in the debate regarding the consideration of evidence outside of the administrative record is *Citizens to Preserve Overton Park v. Volpe*, in which the Supreme Court considered a suit brought by private parties to enjoin the Department of Transportation (DOT) from releasing funds for construction of a highway.⁸³ The Court held that judicial review is to be based on the full administrative record that was before the ultimate decisionmaker at the time of the decision.⁸⁴ This limitation derived primarily from section 706 of the APA, which instructs a reviewing court to review the whole record or those parts cited by a party.⁸⁵ The Court's interpretation of this language has led to the modern doctrine known as the "record rule," which effectively limits a reviewing court's consideration of the evidence to the administrative record.⁸⁶

Courts have recognized some exceptions to the record rule.⁸⁷ The Supreme Court held that extra-record investigation may be appropriate when there has been a strong showing of bad faith or improper behavior on the part of the decisionmakers, or where the absence of formal administrative findings necessitates an investigation to determine the reasons for the agency's choice.⁸⁸ In addition to these general exceptions explicitly established by the Supreme Court,⁸⁹ an exception tailored specifically for NEPA review also exists.⁹⁰ The Second Circuit, in *Suffolk County v. Secretary of the Interior*, noted that "a primary function of the court is to [e]nsure that the information available to the [decisionmaker] includes an adequate discussion of environmental effects

⁸² See *Forest Guardians*, 611 F.3d at 716–17; *Nat'l Audubon*, 422 F.3d at 198–99.

⁸³ 401 U.S. 402, 406 (1971).

⁸⁴ *Id.* at 420. The Court did recognize that "[t]he court may require the administrative officials who participated in the decision to give testimony explaining their action. Of course, such inquiry into the mental processes of administrative decisionmakers is usually to be avoided." *Id.*

⁸⁵ Administrative Procedure Act, 5 U.S.C. § 706 (2006); *Overton Park*, 401 U.S. at 419.

⁸⁶ See *Overton Park*, 402 U.S. at 419–20; see also James N. Saul, Comment, *Overly Restrictive Administrative Records and the Frustration of Judicial Review*, 38 ENVTL. L. 1301, 1301 (2008).

⁸⁷ Susannah T. French, Comment, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CAL. L. REV. 929, 931 (1993).

⁸⁸ *Overton Park*, 401 U.S. at 420; French, *supra* note 87, at 941, 952–53.

⁸⁹ Saul, *supra* note 86, at 1308–11. The general exceptions to the record rule include: (1) [w]here there is a strong showing of bad faith or improper behavior; (2) [w]here a "bare" record frustrates effective judicial review; (3) [w]here a agency considered materials that it failed to include in the record; and (4) [w]here additional information is necessary to explain complex issues. *Id.*

⁹⁰ French, *supra* note 87, at 948–53.

and alternatives, which can sometimes be determined only by looking outside the administrative record to see what the agency may have ignored.”⁹¹ The court recognized allegations that an EIS has omitted serious environmental consequences, or has failed to adequately discuss some reasonable alternative, raise issues important enough to warrant the introduction of new evidence.⁹² These issues are sufficiently important to allow for the consideration of extrinsic evidence both in challenges to the sufficiency of an EIS and in suits attacking an agency’s decision to issue a FONSI.⁹³ Although the Supreme Court has not explicitly recognized this NEPA exception to the record rule, multiple circuit courts of appeal have applied it in reviewing agency decisions under NEPA.⁹⁴

III. SCOPE OF EVIDENTIARY REVIEW IN NEPA PREDETERMINATION CASES

Although courts generally agree on the application of the Administrative Procedure Act standard,⁹⁵ there is no statutory instruction regarding the proper scope of evidence to be considered by a court in reviewing agency impact analyses.⁹⁶ There have been significant inconsistencies in judicial reviews of citizen suits specifically alleging agency predetermination.⁹⁷ Courts have generally agreed on the “trigger point” for predetermination, holding that an agency has violated NEPA when it made an irreversible and irretrievable commitment of resources to an outcome prior to making its final decision.⁹⁸ Two distinct approaches, however, have been taken by courts regarding the appropriate scope of admissible evidence to determine if an agency has crossed this threshold.⁹⁹ Some courts, such as the Fourth Circuit, have adopted a narrow approach in reviewing agency Environmental Impact Statements (EIS)

⁹¹ 562 F.2d 1368, 1384 (2d. Cir. 1977) (citations omitted); French, *supra* note 87, at 950.

⁹² *Suffok County*, 562 F.2d at 1384–85; French, *supra* note 87, at 950.

⁹³ *Suffok County*, 562 F.2d at 1384–85; French, *supra* note 87, at 950.

⁹⁴ See, e.g., *Forest Guardians*, 611 F.3d at 716–17; *Metcalf*, 214 F.3d at 1143–44.

⁹⁵ See *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 704 (10th Cir. 2010); *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000).

⁹⁶ French, *supra* note 87, at 938.

⁹⁷ Compare *Forest Guardians*, 611 F.3d at 716–17, with *Nat’l Audubon Soc’y v. Dep’t of the Navy*, 422 F.3d 174, 198–99 (4th Cir. 2005).

⁹⁸ See *Forest Guardians*, 611 F.3d at 714–15; *Metcalf*, 214 F.3d at 1145; *Conner v. Burford*, 848 F.2d 1441, 1446 (1988).

⁹⁹ Compare *Forest Guardians*, 611 F.3d at 716–17 (allowing consideration of extra-record evidence), with *Nat’l Audubon*, 422 F.3d at 198–99 (refusing to consider extra-record evidence).

that limits reviewable evidence to the impact analysis prepared by the agency and prohibiting the consideration of any external material.¹⁰⁰ Other courts, such as the Tenth Circuit, have adopted a broad approach that allows examination of any material that tends to show that an agency passed the trigger point for predetermination.¹⁰¹ Under this latter approach, courts have considered government contracts, agency correspondence, and other relevant evidence.¹⁰²

This section first explores the evolution of the Fourth Circuit's narrow approach, beginning with *Fayetteville Area Chamber of Commerce v. Volpe*¹⁰³ and culminating in *National Audubon Society v. Department of the Navy*.¹⁰⁴ The Tenth Circuit's approach is then examined as applied by both the Ninth and Tenth Circuits. The expansive standard is applied first by the Ninth Circuit in *Metcalf v. Daley*¹⁰⁵ and more recently in the Tenth Circuit's decisions in *Davis v. Mineta*,¹⁰⁶ *Lee v. U.S. Air Force*,¹⁰⁷ and *Forest Guardians v. U.S. Fish and Wildlife Service*.¹⁰⁸ These cases provide factual applications and competing reasoning for the exclusion or inclusion of extra-record evidence.

A. Cases Utilizing the Narrow Scope of Review

1. Roots of the Fourth Circuit's Narrow Approach: *Fayetteville Area Chamber of Commerce v. Volpe*

In *Fayetteville Area Chamber of Commerce v. Volpe*, Fayetteville's Chamber of Commerce challenged an EIS submitted by the Department of Transportation (DOT) analyzing the environmental impacts of potential locations for a highway bypass in North Carolina.¹⁰⁹ The plaintiffs argued that a state highway official's administrative decision approving the location of the bypass precluded the proper EIS from being prepared under NEPA, as it was essentially evidence of predetermination

¹⁰⁰ *Nat'l Audubon*, 422 F.3d at 198–99.

¹⁰¹ *Forest Guardians*, 611 F.3d at 716–17.

¹⁰² *See id.* at 716 (considering extra-record agency meeting minutes, correspondence, and grant agreement); *Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004) (considering, but not admitting, an extra-record affidavit); *Metcalf*, 214 F.3d at 1143 (considering an extra-record contract).

¹⁰³ 515 F.2d 1021, 1023–24 (4th Cir. 1975).

¹⁰⁴ 422 F.3d at 198–99.

¹⁰⁵ 214 F.3d at 1143.

¹⁰⁶ 302 F.3d 1104, 1112 (10th Cir. 2002).

¹⁰⁷ 354 F.3d at 1242.

¹⁰⁸ *Forest Guardians*, 611 F.3d at 704.

¹⁰⁹ 515 F.2d at 1023–24.

of the EIS's outcome.¹¹⁰ The Fourth Circuit refused to consider the prior administrative decision as evidence of such predetermination, basing its decision on the Eighth and Ninth Circuits' stance that the test for compliance with an EIS "is one of good faith objectivity rather than subjective impartiality."¹¹¹ This distinction is elucidated in *Environmental Defense Fund, Inc. v. Corps of Engineers*, where the Eighth Circuit stated that it is possible for agency officials to comply in good faith with NEPA, even if they personally oppose its philosophy or have preconceived attitudes and opinions as to the propriety of the project.¹¹² Deeming the administrative decision evidence of subjective intent, and thus disregarding it, the court found that the EIS was completed with good-faith objectivity and therefore upheld its validity because it was neither arbitrary nor capricious.¹¹³

2. Modern Day Narrow Approach: *National Audubon Society v. Department of the Navy*

In *National Audubon Society v. Department of the Navy*, the plaintiffs alleged that the U.S. Navy failed to conform to NEPA requirements in its EIS for the proposed construction of an aircraft-landing training field within five miles of a national wildlife refuge.¹¹⁴ The plaintiffs, two counties and multiple environmental organizations, alleged that numerous agency emails and documents strongly suggested that the site for the landing field was predetermined as a political decision to appease surrounding communities' concerns about jet noise.¹¹⁵ The trial court held that the Navy "reverse-engineered" the EIS to justify its predetermined choice of landing site.¹¹⁶ The Fourth Circuit, however, held that the lower court was overly broad in both the scope of its review and its injunction.¹¹⁷ The Fourth Circuit refused to consider the internal documents as evidence of a predetermined decision to locate the landing strip at a specific site prior to beginning its EIS, citing *Fayetteville's* admonition against examining an agency's "subjective impartiality."¹¹⁸

¹¹⁰ See *id.* at 1023.

¹¹¹ *Id.* at 1026.

¹¹² 470 F.2d 289, 296 (8th Cir. 1972).

¹¹³ *Fayetteville*, 515 F.2d at 1026, 1028.

¹¹⁴ 422 F.3d at 181–83.

¹¹⁵ See *id.* at 181, 198; *Washington Cnty., N. Carolina v. U.S. Dep't of the Navy*, 357 F. Supp. 2d 861, 874 (E.D.N.C. 2005), *aff'd in part, vacated in part*, *Nat'l Audubon*, 422 F.3d at 174.

¹¹⁶ *Nat'l Audubon*, 422 F.3d at 183.

¹¹⁷ *Id.* at 181, 207.

¹¹⁸ *Id.* at 199 (citing *Fayetteville*, 515 F.2d at 1026).

Nevertheless, because of significant defects in the Navy's EIS, the court ultimately concluded that the Navy failed to take a hard look at the environmental impacts of the project, and thus remanded the case in part and required the Navy to undertake further environmental study.¹¹⁹

B. Cases Utilizing Broad Scope of Review

1. The Ninth Circuit's Expansive Approach: *Metcalf v. Daley*

In *Metcalf v. Daley*, the plaintiffs challenged a finding of no significant impact (FONSI) prepared by the National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (NMFS) in regard to a proposal by the Makah Indian Tribe to resume whaling.¹²⁰ The plaintiffs pointed to two agency agreements with the Makah: (1) a 1996 agreement in which NOAA, on behalf of the United States, promised to make a formal request to the International Whaling Commission (IWC), and (2) a 1997 agreement, made four days before the issuance of the final EA, binding the United States to pursue the whaling quota at the IWC on behalf of the Makah.¹²¹ The Ninth Circuit recognized the incentive for NOAA/NMFS to issue a FONSI; the agencies would have been required to prepare an EIS upon a finding of significant environmental impact, which may ultimately have led to a breach of the Makah contract.¹²² The court noted that even though the EA and FONSI in *Metcalf* were not facially flawed, "[i]t [was] highly likely that because of the Federal Defendants' prior written commitment . . . and concrete efforts . . . the EA was slanted in favor of finding that the . . . proposal would not significantly affect the environment."¹²³ Relying on evidence of the agreement, the court held that the agencies violated NEPA by making "an irreversible and irretrievable commitment of resources" before taking a hard look at the potential environmental effects of the proposed action.¹²⁴

2. The Tenth Circuit's Broad Scope: *Davis v. Mineta*

The plaintiffs in *Davis v. Mineta* refuted the validity of a FONSI issued by the DOT and the Federal Highway Administration (FHWA) for

¹¹⁹ *Id.* at 207.

¹²⁰ 214 F.3d at 1140.

¹²¹ *Id.* at 1143-44.

¹²² *Id.* at 1144.

¹²³ *Id.*

¹²⁴ *Id.* at 1145.

the proposed construction of a highway in Salt Lake City, Utah.¹²⁵ The plaintiffs introduced an addendum to the Engineering Services Agreement—between Sandy City, where the project was partially located, and the consultant preparing the EA—which included a contractual obligation to prepare a FONSI and have it approved, signed, and distributed by the FHWA.¹²⁶ The Tenth Circuit held that such contractually-based prejudgments diminished the deference afforded to agency determinations and consequently found that the FONSI was arbitrary and capricious, thus violating NEPA.¹²⁷

3. Tenth Circuit Revisited: *Lee v. U.S. Air Force*

In *Lee v. U.S. Air Force*, the plaintiffs challenged the U.S. Air Force's (USAF) FONSI for a plan to station thirty German training aircrafts at an aircraft base.¹²⁸ The plaintiffs, ranchers and livestock associations located in the surrounding area, argued that an agreement between the United States and Germany contractually bound the USAF to approve the plan and constituted predetermination.¹²⁹ The Tenth Circuit examined the contract and found that not only was the contract signed after the FONSI was issued, but the contract only stipulated that the United States accept a beddown of twelve German aircrafts and would not go into effect unless the USAF approved the action under NEPA's requirements.¹³⁰ Plaintiffs, however, also sought to admit a real estate appraiser's affidavit that was not included in the administrative record.¹³¹ The court examined the affidavit and ultimately decided not to admit it because it failed to demonstrate any gaps in the agency's analysis.¹³² Having examined the record and the affidavit, the court found that the USAF had not predetermined the outcome of the impact analysis and upheld the FONSI.¹³³

¹²⁵ 302 F.3d at 1109–10.

¹²⁶ *Id.* at 1109, 1112. The court also considered extra-record evidence, including a memorandum from defendant's law firm criticizing the Environmental Assessment's treatment of alternatives, as well as agency meeting minutes. *Id.* at 1112–13.

¹²⁷ *Id.* at 1122.

¹²⁸ 354 F.3d at 1233.

¹²⁹ *Id.* at 1233, 1240.

¹³⁰ *Id.* at 1240.

¹³¹ *Id.* at 1242.

¹³² *Id.*

¹³³ *Id.* at 1240, 1246.

4. The Tenth Circuit's Recent View: *Forest Guardians v. U.S. Fish and Wildlife Service*

The plaintiff in *Forest Guardians v. U.S. Fish and Wildlife Service*, an environmental group, brought an action challenging the Fish and Wildlife Service's (FWS) FONSI for a proposed 1539(j) rule under the Endangered Species Act¹³⁴—which sought to reintroduce a captive-bred experimental population of endangered falcons in New Mexico.¹³⁵ The plaintiff relied on evidence such as intra-agency comments on the draft rule, agendas and minutes from meetings between the FWS and The Peregrine Fund (an advocate for the reintroduction of the falcon), e-mail correspondence, and a grant agreement between the FWS and The Peregrine Fund to challenge the FONSI.¹³⁶ The Tenth Circuit reviewed the evidence and concluded that it did not support a finding of pre-determination based on the concretely defined “irreversible and irretrievable commitment” standard, because the comments and correspondence simply showed internal disagreement and, at most, a preferred alternative.¹³⁷ Furthermore, the court concluded that the grant agreement was not a binding contract, because it simply provided expansion of the grant conditioned upon promulgation of another rule that called for the reintroduction of the Falcon population, a result that was undetermined because the rule was not yet approved.¹³⁸ Consequently, the court upheld the FONSI, finding that the FWS did not predetermine the outcome and therefore did not act arbitrarily or capriciously.¹³⁹

C. *Circuit Split: Following Narrowly Behind the Fourth Circuit or Broadly Behind the Tenth Circuit*

The Fourth and Seventh Circuits employ a narrow scope of evidentiary review in determining whether an agency has predetermined the outcome of an EIS or EA, allowing consideration of only the impact statement itself.¹⁴⁰ The Ninth and Tenth Circuits reject this narrow ap-

¹³⁴ Section 1539(j) allows the Secretary to, *inter alia*, “authorize the release (and the related transportation) of any population . . . of an endangered species or a threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species.” 16 U.S.C. § 1539(j) (2006).

¹³⁵ 611 F.3d at 695.

¹³⁶ *Id.* at 695, 716.

¹³⁷ *Id.* at 718.

¹³⁸ *Id.* at 718–19.

¹³⁹ *Id.* at 719.

¹⁴⁰ *Nat'l Audubon*, 422 F.3d at 198–99; *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 443–44 (7th Cir. 1990).

proach, however, and allow review of materials outside of the impact statement in order to enable a more rigorous and open-minded examination.¹⁴¹ Although both the Fourth and Tenth Circuits recognize the general exceptions to the record rule, the Tenth Circuit has advocated for the adoption of the NEPA exception—recognizing the significant risk behind the allegation that an EIS or EA has not been properly prepared.¹⁴² The Fourth Circuit, in *National Audubon*, explicitly recognized exceptions to the record rule¹⁴³ but declined to apply the Tenth Circuit's approach employing the NEPA exception without imposing the burdens of the general exceptions set out in *Citizens to Preserve Overton Park v. Volpe*.¹⁴⁴

IV. KEEPING NEPA ON TRACK NECESSITATES GOING OFF THE RECORD

The lack of a uniform evidentiary standard among the circuit courts in reviewing whether an agency predetermined the outcome of its impact analysis, and therefore engaged in arbitrary or capricious decision making, necessitates clearly delineated standards for courts to employ.¹⁴⁵ Although the Fourth Circuit has raised doubts as to the propriety of extra-record judicial inquiry by citing the risks of examining subjective impartiality,¹⁴⁶ the Tenth Circuit has compellingly refuted these dangers.¹⁴⁷ Absent these hazards, the need for a rigorous examination of agency decisions¹⁴⁸ and the interest in preventing sunk costs¹⁴⁹ and environmental degradation favors the admissibility of extra-record evidence in judicial review of agency predetermination claims.

A. Subjective Impartiality

Avoidance of the examination of subjective impartiality is an accepted tenet of the NEPA review process; however, the Fourth Circuit's warnings are misplaced.¹⁵⁰ In *National Audubon Society v. Department of the*

¹⁴¹ *Forest Guardians*, 611 F.3d at 716–17; see *Metcalf*, 214 F.3d at 1143–44.

¹⁴² See *Forest Guardians*, 611 F.3d at 716–17; French, *supra* note 87, at 952.

¹⁴³ *Nat'l Audubon*, 422 F.3d at 188 n.4.

¹⁴⁴ See *Forest Guardians*, 611 F.3d at 716–17; *Nat'l Audubon*, 422 F.3d at 198–99; *Overton Park*, 401 U.S. at 420.

¹⁴⁵ See *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 716 (10th Cir. 2010); *Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 198–99 (4th Cir. 2005).

¹⁴⁶ See *infra* notes 150–158 and accompanying text.

¹⁴⁷ See *infra* notes 159–167 and accompanying text.

¹⁴⁸ See *infra* notes 168–185 and accompanying text.

¹⁴⁹ See *infra* notes 186–197 and accompanying text.

¹⁵⁰ See *Forest Guardians*, 611 F.3d at 712, 716–17.

Navy, the court warned that examining subjective intent under NEPA could open a Pandora's Box and should be avoided.¹⁵¹ The court was wary of restricting "the open exchange of information within an agency, inhibit[ing] frank deliberations, and reduc[ing] the incentive to memorialize ideas in written form."¹⁵² These hypothetical restrictions on agency freedom arguably result from the agency's fear that anything found in writing could be used for purposes of discerning predetermination.¹⁵³ The court also argued that such an inquiry could restrict an agency's capacity to change its mind or redirect its efforts.¹⁵⁴ Furthermore, the court questioned the efficacy of such inquiries, as most agencies consist of a multitude of actors with different levels of responsibilities, thus making a determination of subjective intent highly speculative.¹⁵⁵

Although judicial psychoanalysis of subjective agency intent is undesirable, courts should not disregard the reality that agencies can be shown to have predetermined outcomes in numerous ways, many of which exist outside of the formal analysis itself.¹⁵⁶ The allowance of preferred alternatives and deference to an agency's subjective intent should not preclude courts from discerning whether an agency has predetermined the outcome of an environmental impact analysis and consequently violated its statutory duty.¹⁵⁷ By categorizing much of the evidence of predetermination as being within the subjective license of agencies, the Fourth Circuit precludes the review of large amounts of information relevant to impact analysis challenges.¹⁵⁸

B. *Refuting the Dangers of Expansive Review*

The Fourth Circuit suggests that the narrow application of the record rule is necessary to avoid significant dangers associated with extra-record review; however, the proper application of judicial review protects against these risks.¹⁵⁹ The Tenth Circuit refuted the dangers warned of in *National Audubon*, asserting that extending its review beyond the NEPA analysis would not have detrimental effects because the

¹⁵¹ 422 F.3d at 198–99.

¹⁵² *Id.*

¹⁵³ *See id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *See Forest Guardians*, 611 F.3d at 717.

¹⁵⁷ *See id.* at 717–18.

¹⁵⁸ *See id.*; *Nat'l Audubon*, 422 F.3d at 198–99.

¹⁵⁹ *See Forest Guardians*, 611 F.3d at 717–18; *Nat'l Audubon*, 422 F.3d at 198–99.

evidence considered must meet the rigorous standard of establishing that an agency has made “an irreversible and irretrievable commitment.”¹⁶⁰ This standard requires that such a commitment be based upon a particular environmental outcome, as it would therefore cause any subsequent environmental analysis to be “biased and flawed.”¹⁶¹ This ensures that employees need not worry about memorializing debates and discussions unless such communications could be characterized as binding the agency to a course of conduct.¹⁶² This argument assuages the Fourth Circuit’s concern that intra-agency freedom will be unduly restricted, as agency employees can feel free to write anything down that does not embody an impermissible commitment of resources.¹⁶³

Similarly, the characterization of extra-record review as subjective is misguided because only objective evidence of conduct violative of NEPA’s mandates would impact the court’s decision.¹⁶⁴ This judicial restraint is illustrated in *Lee v. U.S. Air Force*, where the court examined but refused to admit an extra-record affidavit that did not prove agency predetermination because it failed to demonstrate any gaps in the agency’s analysis.¹⁶⁵ Similarly, the court in *Forest Guardians v. U.S. Fish and Wildlife Service* also concluded that due to the very high standard for predetermination, it must restrict itself to considering only relevant voices within the agency, namely those who could effectuate such an irreversible and irretrievable commitment of resources.¹⁶⁶ Due to the limited number of agency officials with this power and the high level of commitment required to bind an agency to a course of conduct, the Fourth Circuit’s concerns regarding the speculative nature of the inquiry are further quelled.¹⁶⁷

¹⁶⁰ *Forest Guardians*, 611 F.3d at 717–18; *Nat’l Audubon*, 422 F.3d at 198–99.

¹⁶¹ *Forest Guardians*, 611 F.3d at 717.

¹⁶² *Id.* at 717–18.

¹⁶³ *See id.*

¹⁶⁴ *See id.* at 716–18; *Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004).

¹⁶⁵ *Lee*, 354 F.3d at 1242.

¹⁶⁶ 611 F.3d at 717–18. The court stated:

The relevant voices must be those who would be situated by virtue of their positions to effectuate an irreversible and irretrievable commitment of the agency regarding the matter at hand. Accordingly, the stray comments of a low-level scientist or two—no matter how vigorously expressed—would be unlikely to render fatally infirm the otherwise unbiased environmental analysis of an entire agency.

Id.

¹⁶⁷ *See id.*

C. Ensuring Rigorous Decision Making

Broad evidentiary review is necessary to ensure rigorous analysis of agency behavior, especially with regard to claims of predetermination.¹⁶⁸ In justifying its rejection of the Fourth Circuit's application of the record rule, the Tenth Circuit asserted that the narrow approach in *National Audubon* prevents a sufficiently rigorous analysis of agency decision making.¹⁶⁹ In general terms, the court claims that such a limited evidentiary approach "could fail to detect predetermination in cases where the agency has irreversibly and irretrievably committed itself to a course of action, but where the bias is not obvious from the face of the environmental analysis itself."¹⁷⁰ This is a concern where agencies have violated section 1502.2(g) of NEPA and used the Environmental Impact Statement to justify decisions that have been predetermined prior to the completion of the impact analysis.¹⁷¹ Courts adopting the narrow approach may contend that "[w]here an agency has merely engaged in post hoc rationalization, there will be evidence of this in its failure to comprehensively investigate the environmental impact of its actions and acknowledge their consequences."¹⁷² It is unlikely, however, that an agency would complete its analysis with noticeable deficiencies.¹⁷³ When coupled with the reality that agencies often adopt a favored course of action during an impact analysis, the availability of evidence external to the EIS takes on added importance to ensure that no irreversible commitment has been made prior to the Record of Decision.¹⁷⁴ The Tenth Circuit rightly doubts the wisdom of disregarding evidence necessary to ensure that an agency only reaches a decision after carefully considering the environmental impacts of several alternatives.¹⁷⁵ In order to expose premature commitments of resources and an agency's violation of statutory duties under NEPA, review of evidence outside the scope of the impact statement is often necessary.¹⁷⁶

This view is supported by the Ninth Circuit's analysis in *Metcalf v. Daley*, where the only evidence of predetermination was in written agreements made prior to the finding of no significant impact (FON-

¹⁶⁸ See *id.* at 717.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See 40 C.F.R. § 1502.2(g) (2010); *Forest Guardians*, 611 F.3d at 717.

¹⁷² See *Nat'l Audubon*, 422 F.3d at 199.

¹⁷³ See, e.g., *Davis v. Mineta*, 302 F.3d 1104, 1112 (10th Cir. 2002).

¹⁷⁴ See 40 C.F.R. § 1502.14(e); *Forest Guardians*, 611 F.3d at 718.

¹⁷⁵ See *Forest Guardians*, 611 F.3d at 717–18.

¹⁷⁶ See *id.*

SI).¹⁷⁷ Had the Ninth Circuit in *Metcalf* utilized the narrow evidentiary approach, the court would have been unwilling to consider the agreements because they were not included in the Agency's Environmental Assessment (EA).¹⁷⁸ Thus, without any evidence of irreversible and irretrievable commitment on the face of the analysis, the FONSI would have been upheld and NEPA's purpose and protections would have been defeated.¹⁷⁹ The court noted that even though the EA and FONSI in *Metcalf* were not facially flawed, it was highly likely, due to the Agency's prior written commitment for a proposed course of action and subsequent concrete efforts, that the EA was "slanted in favor" of finding that the proposal would have significant effects on the environment.¹⁸⁰

The Tenth Circuit, in *Davis v. Mineta*, also provides strong support for the expansive evidentiary approach to predetermination review.¹⁸¹ The most probative evidence pointing to predetermination by the Federal Highway Administration (FHWA) was the existence of an addendum to an agreement between the parties as well as extra-record memorandum and meeting minutes, but this evidentiary material would not have been considered under strict application of the record rule by the Fourth Circuit.¹⁸² The Tenth Circuit, however, having allowed the evidence, was able to consider the clear evidence of prejudgment and enjoin the FHWA from proceeding with its proposal.¹⁸³ By employing a more realistic and limited interpretation of subjectivity while maintaining a high standard of relevance, the court ensured a rigorous analysis of the decision-making process without endangering agency autonomy or judicial deference.¹⁸⁴ The protection of both NEPA's purpose and agency discretion suggests that this judicial approach should guide courts in their review of agency impact analyses.¹⁸⁵

D. *Prevention of Sunk Costs*

The prevention of agency predetermination through rigorous judicial review is imperative in order to deter sunk costs.¹⁸⁶ The sunk-cost

¹⁷⁷ 214 F.3d 1135, 1143–44 (9th Cir. 2000).

¹⁷⁸ *See id.*

¹⁷⁹ *See id.*

¹⁸⁰ *See id.* at 1144.

¹⁸¹ *See* 302 F.3d at 1112.

¹⁸² *See id.*

¹⁸³ *See id.* at 1112, 1126.

¹⁸⁴ *See Forest Guardians*, 611 F.3d at 716–17; *Davis*, 302 F.3d at 1112.

¹⁸⁵ *See Forest Guardians*, 611 F.3d at 716–18.

¹⁸⁶ *See* Kopf, *supra* note 23, at 400.

strategy is used by project proponents to essentially bypass NEPA requirements by committing significant resources to a project prior to fulfilling procedural requirements such as the EA.¹⁸⁷ Although not always rising to the level of sunk costs incurred in *Citizens to Preserve Overton Park v. Volpe*, where the DOT began condemning homes and making other significant investments prior to seeking the approval required under the Endangered Species Act,¹⁸⁸ irreversible and irretrievable commitments of resources can put courts, agencies, and, most importantly, the environment at an impasse.¹⁸⁹ These commitments can take the form of monetary expenditures, environmental harm, or even the breakdown of contractual negotiations or international relationships.¹⁹⁰ In cases like *Metcalf v. Daley*, where an agency has engaged in prior agreements that hinge on favorable results of the NEPA environmental analysis, the agency often has much to lose should a court find pretermination.¹⁹¹ The National Marine Fisheries Service's (NMFS) FONSI was essentially a foregone conclusion based on prior agreements with the Makah tribe, and therefore put the agency and court in the difficult position of upholding NEPA and protecting the whale population or damaging the relationship with the Makah and potentially the IWC.¹⁹² Although *Metcalf* provides an atypical example of sunk costs, in that monetary loss was not at issue, it is a poignant indicator of the need for deterrence of the sunk-cost strategy.¹⁹³

Although CEQ regulations promulgated pursuant to NEPA include the express prohibition of irreversible and irretrievable commitments of resources in an effort to combat such costs, the judicial enforcement mechanism is the only preventative tool for this risk.¹⁹⁴ The Tenth Circuit's broad evidentiary approach provides a stronger deterrent to sunk costs, as it puts agencies on notice that they cannot hide impermissible commitments of resources from the courts simply by ex-

¹⁸⁷ See *id.*

¹⁸⁸ ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 233–34 (4th ed. 2010); see 401 U.S. 402, 406–08 (1971). Section 7(d) of the ESA states that the “[f]ederal agency and the [applicant] shall not make any irreversible or irretrievable commitment of resources . . . which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate [endangered species protections].” 16 U.S.C. § 1536(d) (2006).

¹⁸⁹ See Kopf, *supra* note 23, at 393–94.

¹⁹⁰ See, e.g., *Metcalf*, 214 F.3d at 1144; PLATER ET AL., *supra* note 188, at 233–34.

¹⁹¹ See *Metcalf*, 214 F.3d at 1144.

¹⁹² See *id.*

¹⁹³ See *id.*

¹⁹⁴ See 40 C.F.R. § 1502.2(f) (2010); CROSS, *supra* note 54, § 1.21.

cluding them from the administrative record.¹⁹⁵ If fully constrained by the record rule, courts would often be helpless to combat the biased decision making resulting from premature investment in a course of action, and would therefore be unable to enforce NEPA's protection of the environment.¹⁹⁶ Without the Tenth Circuit's expansive approach, agencies such as the NMFS in *Metcalf* could invest in a course of action that leads to a predetermined outcome of the environmental assessment and potentially the adoption of a less favorable alternative.¹⁹⁷

CONCLUSION

The environmental impact analyses undertaken by government agencies must be a rigorous and comprehensive report on the effects and alternatives of proposed actions to enable the agency and the public to make an informed decision regarding the proposal. Although NEPA and the CEQ created the statutory and regulatory framework necessary to guide agencies in this pursuit, there is no guarantee that the agencies will comply with these requirements. Thus, effective guidance is needed to ensure that agencies are taking the requisite hard look at environmental consequences of their proposals and not simply justifying predetermined outcomes in their impact statements. The task of reviewing these analyses, and therefore the successful enforcement of NEPA, lies with the courts. In the absence of guidance from NEPA and the CEQ courts have adopted different approaches, not all of which are adequate in rooting out predetermination.¹⁹⁸

The Tenth Circuit has utilized a comprehensive and effective approach to judicial review of agency impact statements by allowing for the examination of relevant extra-record evidence, including materials separate from the impact report itself.¹⁹⁹ The standards for predetermination, namely an agency's irreversible and irretrievable commitment to an outcome prior to the completion of a final impact statement, provide intrinsic safeguards against unfavorable restriction of agency autonomy.²⁰⁰ This broad evidentiary approach enables courts to engage in a rigorous examination of the impact analysis without detrimentally affecting the agency's analytical process.²⁰¹ Furthermore, courts can more

¹⁹⁵ See *Forest Guardians*, 611 F.3d at 716–18.

¹⁹⁶ See *id.*; Kopf, *supra* note 23, at 394, 400.

¹⁹⁷ See *Forest Guardians*, 611 F.3d at 716–18; *Metcalf*, 214 F.3d at 1143–44.

¹⁹⁸ See *supra* notes 95–144 and accompanying text.

¹⁹⁹ See *supra* notes 145–197 and accompanying text.

²⁰⁰ See *supra* notes 159–167 and accompanying text.

²⁰¹ See *supra* notes 168–185 and accompanying text.

effectively combat sunk costs by being better equipped to identify impermissible commitments of resources.²⁰² For these reasons, courts should universally adopt the broad scope of judicial review to ensure that NEPA's goals and the environment itself are adequately protected.

²⁰² See *supra* notes 186–197 and accompanying text.